

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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RUSSELL D. TOWNER,

Plaintiff,

-vs-

**COUNTY OF TIOGA, KIRK O. MARTIN,
Individually and in his Official Capacity as
Tioga County District Attorney,
PATRICK HOGAN, Individually and in his
Official Capacity as Tioga County Sheriff's
Department Investigator,
WAYNE MOULTON, Individually and in his
Official Capacity as Tioga County Sheriff's
Department Investigator, and
C.J. ALEXANDER, Individually and in his
Official Capacity as Tioga County Sheriff's
Department Investigator,**

Defendants.

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**SECOND AMENDED
COMPLAINT**

**Civil Case No.: 3:15-cv-00963
(GLS/DEP)**

JURY TRIAL DEMANDED

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PARTIES

1. Plaintiff Russell D. Towner resides at 2252 State Route 17C, Barton, New York, County of Tioga.
2. Defendant Kirk O. Martin is the District Attorney for the County of Tioga and is sued in his official and individual capacity for conduct taken in the investigatory phase of the prosecution of the plaintiff as set forth below.
3. Defendant Patrick Hogan is an investigator with the Tioga County Sheriff's Department and is sued in his official and individual capacity.
4. Defendant Wayne Moulton is an investigator with the Tioga County Sheriff's

Department and is sued in his official and individual capacity.

5. Defendant C.J. Alexander is an investigator with the Tioga County Sheriff's Department and is sued in his official and individual capacity.

6. Defendant County of Tioga is responsible for all municipal affairs including but not limited to law enforcement and employees such as the individual defendants herein with the exception of Kirk O. Martin.

JURISDICTION

7. This Court has jurisdiction pursuant to 28 U.S.C. §1331 in that plaintiff's claims arise under 42 U.S.C. §1983.

VENUE

8. This Court is the proper venue since all conduct complained of occurred within the Northern District of New York.

STATEMENT OF FACTS

9. That in March 2014 the plaintiff was an inmate at the Tioga County Correctional Facility.

10. That in March of 2014 plaintiff was told by another inmate, namely, David Nugent that it was Nugent's intention to kill Assistant District Attorney Cheryl Mancini.

11. That plaintiff initially believed Nugent was just huffing and puffing because he was annoyed about what transpired in court but then began to be concerned because Nugent kept repeating his intention to either kill her personally or pay someone to do it.

12. That thereafter Nugent solicited other inmates including plaintiff to assist him in murdering ADA Cheryl Mancini.

13. That on or about March 26, 2014 plaintiff wrote ADA Mancini to warn her that

Nugent was making threats to kill her.

14. That in the aforesaid letter plaintiff stated one David Nugent, an inmate at the correctional facility repeatedly stated he intended to kill Mancini.

15. That on or about April 10, 2014 plaintiff's letter to Mancini came to the attention of defendant Martin who telephoned plaintiff's counsel Alan Stone for the purpose of arranging a meeting to be held at the Tioga County jail whereby plaintiff would be interviewed by defendants Hogan and Moulton.

16. That on the aforesaid date plaintiff was brought to an interview room where a videotaped interview took place with defendants Hogan and Moulton and plaintiff's counsel Alan Stone.

17. That defendant Martin discussed the proposed interview with plaintiff's counsel and upon information and belief, remained in an adjoining room when the interview took place or learned of the results of the interview shortly after it was held.

18. That on April 10, 2014 plaintiff came to the interview room with his counsel and met with defendants Hogan and Moulton.

19. That in the course of the meeting plaintiff 's counsel registered concern about the plaintiff incriminating himself in connection with fraud charges that were presently pending against the plaintiff at which time Investigator Hogan stated to the plaintiff "you will be acting as an agent of the police and nothing you say or do can be used against you ", shortly after which he stated "show us you care about this woman's life".

20. That plaintiff agreed to cooperate in securing evidence against Nugent and there was discussion about luring Nugent to the law library where there was either an intercom or another means by which investigators could listen to and/or record their conversations.

21. That in addition to Hogan telling plaintiff he was an agent of the police, Moulton told plaintiff there was a correctional officer at the jail by the name of Shallberger who would cooperate with plaintiff and pass him notes or otherwise get messages from him to Moulton.

22. That on or about April 10, 2014 plaintiff was able to lure Nugent into the law library to have him discuss threats he was making against ADA Mancini.

23. That approximately one week later plaintiff sent Moulton a letter in which he opened with the statement “a lot has happened since we spoke on Thursday”.

24. In addition plaintiff expressly stated “I’ve never had any intention of being involved with any of Nugent’s schemes at all; merely trying to get bailed out and get myself into a program to get my life together in hopes of a better future and that the court would take everything into consideration”.

25. That plaintiff had no further communication with any of the defendants from the time of the aforesaid letter until May 8, 2014.

26. That from the initial meeting on or about April 6, 2014 through May 8 of 2014, Martin, Hogan, and Moulton were all aware that Hogan told plaintiff he was an agent of the police and need not worry about being the subject of a prosecution and that the plaintiff engaged in no conduct that would warrant a reasonable person to believe that there were facts and circumstances that would permit a belief that the plaintiff either had or was about to commit any type of crime, let alone conspire to murder ADA Mancini, quite to the contrary, plaintiff was doing his best to ensure the safety, health and welfare of Mancini.

27. That on May 8, 2014 plaintiff was bailed out of jail by Ashley Nugent.

28. That upon being released on bail defendant Hogan came over to plaintiff and

asked him to participate in an interview with other members of the Sheriff's Department.

29. That at all times herein mentioned defendant Hogan was the chief investigator for the defendants with Moulton and Martin acting in connection with the investigation primarily by discussing ongoing events with each other and Hogan and that up through May 8, 2014 not a single defendant had any evidence that plaintiff was about to or did engage in any criminal conduct with respect to the investigation concerning ADA Mancini.

30. Upon information and belief, Martin, Hogan, and Moulton made a joint decision or otherwise acquiesced in the plaintiff being arrested for the crime of conspiracy in the 2nd degree in violation of Section §105.15 of the Penal Law of the State of New York.

31. That none of the aforesaid three defendants had knowledge or reasonably trustworthy information regarding facts and circumstances that were sufficient to permit a person of reasonable caution to believe that plaintiff had in fact engaged in conduct that would constitute a violation of Section §105.15 of the Penal Law of the State of New York.

32. That subsequent to the plaintiff's arrest Hogan was asked what facts he had to support a reasonable belief that the plaintiff engaged in conduct violating Section §105.15 of the Penal Law of the State of New York and admitted he had no facts other than his own belief the plaintiff was a disreputable person.

33. That sometime prior to May 8, 2014 defendant Clifford Alexander met with Hogan and/or others involved in the investigation and knew or should have known there were no facts upon which a reasonable person could form a belief that plaintiff engaged in any crime let alone a violation of Section §105.15 of the Penal Law of the State of New York.

34. That on or about May 8, 2014 defendant Alexander affirmed under penalty of perjury that on or about April 3, 2014 the plaintiff had the intent to carry out conduct constituting

a felony, namely, the aggravated murder of ADA Cheryl Mancini by conspiring with Ashley Nugent, to bail out David Nugent so he could be free to carry out the plan to murder Mancini.

35. That when defendant Alexander made the aforesaid affirmation alleging the conduct described above he did not have either knowledge or reasonable or trustworthy information regarding facts and circumstances sufficient to warrant a person of reasonable caution to form a belief that plaintiff was in fact engaging in any conduct that could be the basis of a reasonable belief plaintiff was engaging in any activity that constituted a violation of Section §105.15 of the Penal Law of the State of New York.

36. That to the contrary, the only available information to Alexander, as with the other defendants, was that the plaintiff had been working as an agent of the police, namely Hogan and Moulton for the purpose of gathering information to allow them to prosecute Nugent and at no time did the plaintiff engage in any conduct that permitted any one of the defendants to form a reasonable belief he engaged in any criminal conduct.

37. That consistent with the lack of probable cause and in fact lack of any trustworthy information that plaintiff engaged in any criminal conduct, charges against him were dismissed November 5, 2015.

38. That as a result of the defendants' willful and malicious conduct the plaintiff sustained significant emotional distress and mental anguish, humiliation and embarrassment, some of which is permanent in nature.

39. That plaintiff also sustained loss of income in that he was unable to work while incarcerated.

40. That plaintiff further sustained loss of both property and liberty as a result of the defendants' willful and malicious conduct.

AS AND FOR A FIRST CAUSE OF ACTION
(Violation of Plaintiff's Right to Due Process Under
the Fifth and Fourteenth Amendments of the United
States Constitution)

41. Plaintiff repeats and realleges paragraphs "1" through "40" as if fully set forth herein.

42. Upon information and belief defendants Hogan, Moulton, and Martin acting in concert sometime prior to May 8, 2014 conspired to falsely and maliciously charge the plaintiff with conspiracy to murder Assistant District Attorney Cheryl Mancini, when each of the defendants knew, or should have known, that plaintiff was in fact a good Samaritan who first alerted ADA Mancini to a potential threat on her life and thereafter acted as an agent of the investigators who were purportedly looking into the crime of murder or attempt to murder ADA Mancini, which crime was committed or to be committed by David Nugent.

43. That the defendants in furtherance of the unlawful conspiracy to falsely and maliciously charge the plaintiff as aforesaid, engaged in numerous acts including but not limited to meeting with each other, having the plaintiff arrested and/or taken into custody on May 8, 2014 when the defendants knew or should have known plaintiff had committed no crime and as set forth above was acting as a good Samaritan in connection with his conduct, which was at the direction of one or more of the defendants and particularly defendant Hogan, and aimed at assisting defendants in gathering evidence against David Nugent.

44. That in fact Nugent attempted to enlist the plaintiff's assistance in furthering his efforts to murder ADA Mancini and at the request of defendant Martin, plaintiff agreed to meet with Nugent and pursuant to directions that he attempt to elicit information that would be helpful in prosecuting Nugent for conspiracy to commit murder, engaged in conversations with Nugent

and in fact lured Nugent to the law library where an intercom was available so that some or all of the defendants could listen to plaintiff and Nugent speak, with the goal of obtaining evidence the prosecution could use to charge Nugent with conspiracy to commit murder.

45. That at all times herein mentioned plaintiff acted in a manner consistent with being an agent of the police and engaged in no conduct that would lead a reasonable person to believe he was about to engage in any criminal activity.

46. That despite the aforesaid, defendant C.J. Alexander, without any probable cause or trustworthy information arrested the plaintiff on May 8, 2014.

47. That the aforesaid conduct by the defendants deprived plaintiff of the due process of law guaranteed by the Constitution of the United States including but not limited to the Fifth and Fourteenth Amendments thereto.

48. Defendants are liable to plaintiff pursuant to 42 U.S.C. Sec. 1983.

49. That the plaintiff is entitled to compensatory damages in an amount to be proven at trial.

50. That as a result of the willful and malicious conduct of the defendants the plaintiff is entitled to exemplary damages in an amount to be proven at trial.

AS AND FOR A SECOND AND SEPARATE CAUSE OF ACTION
(Malicious Prosecution)

51. Plaintiff repeats and realleges paragraphs "1" through "50" as if fully set forth herein.

52. That at all times herein mentioned the defendants conspired to have the plaintiff prosecuted for conspiracy as aforesaid despite the fact that they knew or should have known there

was no viable basis upon which such prosecution could be brought.

53. That the criminal proceeding terminated in the plaintiff's favor as aforesaid.

54. That each of the defendants acted with malice in that they evinced a reckless disregard of the plaintiff's rights and that plaintiff is entitled to exemplary and compensatory damages in an amount to be proven at trial.

AS AND FOR A THIRD AND SEPARATE CAUSE OF ACTION
(False Arrest)

55. Plaintiff repeats and realleges paragraphs "1" through "54" as if fully set forth herein.

56. That at no time did the defendants ever have any basis to believe plaintiff was engaging in any criminal conduct and quite the contrary was acting as an agent of the investigators who were purportedly investigating the conduct of David Nugent to determine whether or not there was sufficient information to bring criminal charges against him arising out of his conduct as set forth herein.

57. That without probable cause, or any cause, defendants had plaintiff arrested and that plaintiff sustained the damages set forth herein as a result of said arrest.

58. That as a result of the aforesaid plaintiff is entitled to compensatory and exemplary damages in an amount to be proven at trial.

WHEREFORE, plaintiff demands judgment against the defendants as follows:

- (1) Award plaintiff exemplary damages against each individual defendant in an amount to be proven at trial.
- (2) Award plaintiff compensatory damages against Tioga County in an amount to be

proven at trial.

(3) Award plaintiff compensatory damages against each defendant in an amount to be proven at trial.

(4) Award plaintiff the costs and disbursements of this action including but not limited to reasonable attorney's fees.

(5) Award plaintiff such other and further relief as the Court deems just and proper under the circumstances.

Dated: December 15, 2017
Binghamton, New York

s/Ronald R. Benjamin
Ronald R. Benjamin / Fed Bar Roll No.: 101131
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